

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-06

DATE ISSUED: April 14, 1998

ISSUED TO: Dunseith Public School Superintendent Les Jensen

CITIZEN'S REQUEST FOR OPINION

On March 20, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mike Geiermann, on behalf of the Dunseith Education Association, asking whether the Dunseith Public School District Board violated N.D.C.C. § 44-04-19 by holding an executive session that was not authorized by law.

FACTS PRESENTED

The Dunseith Public School District Board (Board) held an executive session during its regular monthly meeting on February 23, 1998. The executive session was held after a member of the Board began discussing some concerns regarding the board member's child and the member's interaction with school district employees. Before the Board went into executive session, the parent-board member discussed certain education records that were previously disclosed to the parent, including the child's grades as recorded in a grade book. In response to an inquiry from this office, Dunseith Public School District Superintendent Les Jensen explained it is the Board's position that the executive session was authorized under state law because the discussion pertained to student records that are confidential under the Family Educational Rights and Privacy Act (FERPA), 23 U.S.C. § 1232g. By letter dated March 5, 1998, Superintendent Jensen denied the Dunseith Education Association's request for a copy of the recording of the executive session on the grounds that the recording was confidential. See N.D.C.C. § 44-04-19.2(5).

The executive session lasted 30 minutes and was attended by the Board members, Superintendent Jensen, the district's business manager, and the elementary and high school principals. The tape recording of the executive session has been received and reviewed by this office.

ISSUE

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Was the executive session of the Board on February 23 authorized by law and limited to topics for which an executive session may be held?

ANALYSIS

Meetings of a school district board are generally required to be open to the public, and an executive session may be held only if "specifically provided by law." N.D.C.C. § 44-04-19. See also N.D.C.C. § 44-04-17.1 (definitions of meeting and public entity). "Law" includes both federal and state statutes. N.D.C.C. § 44-04-17.1(7). An executive session also may be held if the governing body wants to discuss confidential or closed records. N.D.C.C. § 44-04-19.2(1). In this case, the Board has argued that an executive session was authorized because the Board was going to discuss records that are confidential under FERPA. There does not appear to be any other legal basis for holding the executive session in this case, and no other basis has been suggested by the Board.

FERPA provides that federal funds may not be provided to any school "which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization . . .," with certain exceptions that do not apply here. 12 U.S.C. § 1232g(b). This office has previously concluded that a meeting to discuss records that are confidential under FERPA is not subject to the open meetings law. 1994 N.D. Op. Att'y Gen. 118. Whether FERPA authorizes the executive session in this case depends on the definition of "education records" and the topics discussed during the executive session.

"Education records" are defined in FERPA as "those records, files, documents, and other materials which -- i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 23 U.S.C. § 1232g(a)(4)(A). Superintendent Jensen has suggested that this definition includes "verbal" records as well as written records. I disagree. As used in FERPA, "record" means "any information recorded in any way." 34 C.F.R. § 99.3 (1998). This definition does not include unrecorded oral statements, although subsequent oral statements based on "education records" may violate the confidentiality imposed under FERPA.

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The discussion at the executive session consisted of a board member raising concerns about the board member's child, and the resulting discussion between the parent-board member, the other board members, and the elementary principal. Only the very beginning of this discussion referred to the child's grades as recorded in the grade book, which is an education record under FERPA, and was properly held in an executive session. The remainder of the discussion did not address "education records" under FERPA. Therefore, although it was reasonable to believe from the board member's remarks in the open meeting that the discussion would involve confidential records and should be held in executive session, the Board was required to reconvene in an open meeting after the brief mention of the child's grades when it became clear that the discussion no longer involved "education records." The discussion regarding the parent's concerns and the reaction of school district staff to those concerns should have been held in an open meeting.

According to Superintendent Jensen, the parent-board member mentioned the child's grades in the open portion of the meeting.¹ "Education records" of a child can be disclosed by an education facility under FERPA upon written consent of the child's parent. 20 U.S.C. § 1232g(b)(1). However, because a portion of the recording pertained to the child's grades, and because the parent has not consented in writing to disclosure of any "education records", the Board cannot disclose that portion of the recording.

CONCLUSION

It is my opinion that the executive session held by the Board on February 23, 1998, except for brief references to a child's grades, did not involve confidential records or topics for which an executive session is authorized, and therefore violated N.D.C.C. § 44-04-19.

STEPS NEEDED TO REMEDY VIOLATION

The Board must disclose the recording of the executive session, except for the references to the child's grades, to the Dunseith Education Association and to any other member of the public upon

¹FERPA prohibits disclosure of education records by an education facility, not by parents. It would have been appropriate for the parent to ask the Board to go into executive session to discuss the child's education records.

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request as an open record. The Board also must revise the minutes of its February 23 meeting to include the portion of the meeting that was held in executive session.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General